MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

OCTOBER 20 and 21, 1994

The Advisory Committee on Civil Rules met on October 20 and 21, 1994, at the Westin La Paloma in Tucson, Arizona. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Carol J. Hansen Fines, Esq., Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq.. Edward H. Cooper was present as Reporter. Judge William O. Bertelsman attended as Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani, a member of the Bankruptcy Rules Advisory Committee, attended. Thomas E. Willging of the Federal Judicial Center was present. Peter G. McCabe, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Observers included Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., John P. Frank, Esq., Barry McNeil, Esq., and Fred S. Souk, Esq.

The Chairman introduced the new members of the Committee, Justice Durham and Judge Levi.

The Minutes for the April 28 and 29, 1994 meeting were approved, subject to correction of typographical errors.

Rule 4(m): Suits in Admiralty Act

The Suits in Admiralty Act, 46 U.S.C. § 742, requires that the libelant "forthwith serve" the libel on the United States Attorney and the Attorney General of the United States. "Forthwith" has been read to require service within a period much shorter than the 120-day period provided for effecting service under Rule 4(m). Several courts, moreover, have ruled that Rule 4(m) does not supersede the statute because the service requirement is a condition on the United States's waiver of sovereign immunity. Concerns have been expressed that Rule 4(m), in conjunction with Rule 4(i), has become a trap for the unwary.

The Committee considered this problem at the meeting in April, 1994, and concluded that rather than amend Rule 4 to provide warning of an exception for cases governed by § 742, § 742 should be amended to delete the service requirement. Section 742 was enacted before the Civil Rules were adopted, and there is no reason that justifies a distinctive service procedure for actions brought under the Suits in Admiralty Act. Further discussion reinforced this conclusion. The Maritime Law Association has recommended amendment of § 742 for years. There has not been any indication that the Department of Justice believes there are special reasons

that require special rules for these cases.

A motion was adopted by consensus to recommend to the Standing Committee that it recommend Judicial Conference approval of a recommendation that Congress delete the service provisions from 46 U.S.C. § 742.

Rule 5(e)

A proposed amendment of Rule 5(e) was published for comment on September 1, 1994. Discussion of the proposal began with a reminder of the process that led to publication. Publication of electronic filing rules was proposed at the June, 1994 meeting of the Standing Committee by the Appellate and Bankruptcy Rules Advisory Committees. Because the proposals ran parallel to the present provisions of Rule 5(e), it seemed desirable to publish an amended version of Rule 5(e) for comment at the same time. A draft was circulated to the members of this Committee, and was approved for publication by mail vote. The October meeting afforded the first opportunity for Committee discussion of the proposal.

The amended version of Rule 5(e) deletes the present express reference to facsimile filing, but it is intended that facsimile transmission be one of the means of electronic filing that may be authorized by local rule. (A suggestion that the reference to facsimile filing be restored was rejected, on the grounds that it is better to adhere to the phrasing used in other sets of rules and that this point is made clear in the Committee Note.) The amendment would effect two significant changes in the role assigned to the Judicial Conference of the United States. Under the present rule, a district court can authorize filing by facsimile or other electronic means only if the Judicial Conference has authorized filing by such means. This requirement is deleted from the amended rule. The present rule also requires that a local rule be consistent with standards established by the Judicial Conference. The amended rule limits the role of Judicial Conference standards by referring to them as "technical" standards.

There was lengthy discussion of the burdens that may be imposed by facsimile filing. At the same time, the practicing members of the Committee noted that the opportunity to file by means that avoid physical delivery will be welcome. There is no reason to wait until every court can be set up to permit electronic filing. The present situation seems to be that many courts do not have the equipment or staffing required to support filing by electronic means. Other courts, however, may be able to accommodate such filing. These courts should be allowed to proceed.

The question whether the Enabling Act permits delegation to the Judicial Conference of power to establish technical standards was explored. It might be feared that the Enabling Act process cannot be used to delegate the power to proceed without following the complete Enabling Act process in each instance. The fact that the present rule delegates more extensive powers to the Judicial Conference does not of itself answer the question whether this delegation is proper. It was concluded that the power to adopt technical standards can properly be lodged in the Judicial Conference. Great benefits would flow from adherence by all federal courts to common technical standards, facilitating ready compliance by all who wish to accomplish electronic filing. Absent common technical standards, it seems inevitable that different courts will adopt different standards, unless there is common acquiescence in the standards first adopted by a belwether court. As compared to adoption and regular revision of standards by the Judicial Conference, adherence by acquiescence is not likely to achieve as desirable results. Alternatively, common standards might be established by the bureaucratic processes through which the Administrative Office undertakes to support acquisition of electronic filing equipment by district courts. These processes are less open than the processes of the Judicial Conference, and are entirely outside the Enabling Act system. These considerations persuaded the Committee that the various advisory Committees and the Standing Committee have been right all along – the Enabling Act does authorize adoption of rules that delegate the standards-setting function to the Judicial Conference.

There followed substantial discussion of two elements of the published draft. The first was the substitution of "documents" for "papers" in the provision that a court may "permit ~~papers~~ documents to be filed * * *." A motion to restore "papers" passed by vote of 12 to 0, restoring the word used throughout the rest of Rule 5(e). The second was the sentence stating: "An electronic filing under this rule has the same effect as a written filing." It was urged that this sentence, which parallels similar provisions in the other rules published for comment at the same time, is unnecessary. The full effect of this sentence is accomplished by the initial permission to adopt rules that permit a paper to be "filed, signed, or verified." A motion to delete this sentence passed by vote of 10 to 0.

Possible changes in the Committee Note were discussed without final resolution. One would add a suggestion that local rules address the steps required to have the effect of filing a physical paper – one requirement, for example, might be that a physical paper be delivered to the court by some means such as ordinary mail. Another would add a statement that local rules or Judicial Conference technical standards should ensure that a reliable physical record is made of what was done, and how. Yet another

would delete the final two sentences of the Committee Note, which suggest that few courts should want to authorize filing by facsimile transmission. It was concluded that these matters could be addressed when the period for public comment has closed and the time comes for final Committee action on recommendations to the Standing Committee.

Rule 6(e)

At the June, 1994, meeting of the Standing Committee, it was suggested that the several Advisory Committees study the question whether the additional time provided for acting after service by mail should be extended from 3 days to 5 days. Rule 6(e) now provides that whenever an act is required within a prescribed period after service of a notice or other paper, the period is extended by 3 days if service is made by mail. Similar provisions appear in other sets of court rules, all setting the extension at 3 days. See Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(e).

The Bankruptcy Rules Advisory Committee considered amendment of Bankruptcy Rule 9006(f) shortly before this Committee met. The Bankruptcy Rules Committee concluded that the 3-day period should not be extended to 5 days. Some of the considerations that weighed in that decision seem to be peculiar to bankruptcy practice. Others, however, are common to all the sets of rules. The effect of all time periods is affected by the extension of time that occurs when the last day of a specified period is a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. The effect of time periods less than 11 days is affected by the extension that results from exclusion of intermediate Saturdays, Sundays, and legal holidays, a question that was last studied with the 1985 amendment of Rule 6(e). Any change in the rule, even an extension of time, will result in confusion and resentment. A change in one set of rules but not others will result in worse confusion, and occasional losses of rights as parties mistakenly rely on the longer provision in one set of rules when operating under the shorter provision of a different set of rules. All rules should continue to adhere to the same period. And there is no sufficient reason to believe that postal service has deteriorated so markedly, or will have deteriorated so markedly by the time an amended rule would take effect, as to justify amendment now.

These considerations led the Committee to conclude that there is no present need to amend Rule 6(e).

Rule 9(h)

Section 1292(a)(3) of the Judicial Code provides for appeal

from "Interlocutory decrees of * * * district courts * * * determining the rights and liabilities of the parties to admiralty *cases* in which appeals from final decrees are allowed." The final sentence of Rule 9(h) provides: "The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty *cases* shall be construed to mean admiralty and maritime *claims* within the meaning of this subdivision (h)." The meaning of this provision is unclear when a single case includes both an admiralty claim and a nonadmiralty claim. There is some authority that an appeal can be taken from an order that determines the rights and liabilities of the parties with respect to a nonadmiralty claim so long as the case also includes an admiralty claim. If this position is desirable, it can be made secure by revising Rule 9(h). Adhering to current style conventions, the final sentence could read: "A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)."

The Appellate Rules Committee considered this question and concluded that it should be addressed by this Committee.

It was urged that the proposed amendment should be recommended. The values of interlocutory appeal are as great for nonadmiralty claims in an admiralty case as they are for the admiralty claims. The chair of the Practice and Procedure Committee of the Maritime Law Association has expressed the same view. Such scant authority as there is interpreting the present rule reaches the result that would be expressed more clearly by the amended version. Action would simply clarify, not extend or change present appeal doctrine.

This view was met with expressions of hesitation. Section 1292(a)(3) has been construed narrowly, limiting the opportunities for interlocutory appeal in light of final judgment appeal values. Appeal of nonadmiralty claims under § 1292(a)(3) could be seen as a matter of pendent appellate jurisdiction, although it also could be seen as simple interpretation of the statute in light of the consolidation of admiralty procedure with civil procedure. The question can be seen in at least two perspectives: one is that the interlocutory appeal device is a good thing in admiralty cases, and should be made as useful as possible; the other is that there is no apparent justification for treating admiralty cases differently than other cases, and the unique but somewhat antique interlocutory appeal statute should be circumscribed as narrowly as possible.

A motion to adopt the draft amendment was carried forward without immediate decision. It was left to the discretion of the chair to determine whether to submit the issue to vote by mail ballot after submitting additional materials on practice under § 1292(a)(3). The advice of the Maritime Law Association will be sought if the question is not submitted to mail ballot in time for

making recommendations to the January, 1995 meeting of the Standing Committee.

Rule 23

Rule 23 was discussed briefly at the beginning of the meeting, noting that there is nothing on the agenda for action at this meeting. The Federal Judicial Center is just ready to begin the fieldwork in its Rule 23 study. The topic will be the focus of the agenda for the February, 1995 meeting and an important part of the work to be done in conjunction with the ensuing meeting in April. It was recalled that the current draft was sent to the Standing Committee in June, 1993, but pulled back because of the press of other business. If further information shows that the present rule is working reasonably well, perhaps it would be better to avoid modest amendments that might cause more disruption than improvement. In addition, it has become clear that we need to reexamine Rule 23 in terms more fundamental than those underlying the current draft. The focus of concern is on mass torts.

Mass settlement classes are perhaps the most important unknown factor. Recent developments have brought new practices to our experience, particularly in asbestos and silicone gel breast implant litigations. In both, defendants have initiated class actions in an effort to settle and buy peace. In exploring these problems, it would be a mistake to focus attention on approaches that fall within the reach of the Rules Enabling Act. If a careful view of the whole problem suggests that it is better addressed by other means, it could easily be a mistake to attempt a less satisfactory solution by changing the rules.

Rule 26(c)

Proposed amendments to Rule 26(c) were published in October, 1993. The proposal, and public comments on the proposal, were discussed at the April, 1994 meeting of the Committee. The proposal was not acted on at the April meeting. New materials were provided for consideration at this meeting, including two alternative drafts of Rule 26(c) and a proposed amendment of Rule 5(d).

The draft Rule 5(d) amendment would add a new sentence: "A party may agree to destroy unfiled discovery materials, or return them to the person who produced them, only if the person who produced them undertakes to retain the materials and the corresponding discovery requests for five years after the conclusion of all discovery in the action." The Committee did not consider this amendment, and did not consider whether it should remain on the agenda for consideration at a future meeting.

One of the alternative Rule 26(c) drafts was included with the agenda materials for the meeting. This version was intended to incorporate all of the comments on the published draft that urged various proposals for narrowing the scope of protection afforded by a protective order. The other alternative draft incorporated additional provisions capturing concerns reflected in ongoing legislative proposals, and was presented to Committee members for the first time at the meeting in an effort to focus discussion on the differences between the 1993 proposal and the legislative proposals.

Discussion began with review of the history of attempts to consider legislative proposals to amend Rule 26(c). As at the April meeting, it was agreed that careful attention should be paid to the concerns reflected in these legislative proposals. Although the Committee cannot urge adoption of undesirable rules changes for purposes of political expediency, it must be sensitive to the concerns of Congress. Just as public comment on proposed rules provides much valuable information for consideration by the Committee, so legislative proposals reflect information gathered by the legislative process that can prove invaluable in framing the best possible rules proposals. Thoughtful consideration of the concerns that trouble Congress can have a real impact on Congressional deliberations.

It is clear that there is much concern that materials in the federal judicial system "ought to be public." The ongoing political debate is not limited to the particulars of discovery practice, but focuses on larger issues of public information. There is a natural and sharp focus on discovery protective orders, however, and legislation has been proposed that would alter the framework for dealing with protective orders. Judge Higginbotham testified before a Senate Committee, where attention focused on protective orders in products liability and other mass tort settings. It is clear that there is continuing concern in Congress that protective orders may have the effect of preventing access to information that is important to protect the public health and safety, and of making it more costly to litigate parallel claims. There is a risk that this concern, whether or not well-founded in light of actual present practice, will lead to remedies that interfere with the vital lubricating function of discovery protective orders. Over-eager remedies could greatly increase the number of litigated discovery disputes, and ultimately restrict the actual flow of discovery information. It is most important to attempt to achieve a rule that addresses all legitimate needs for limiting protective orders without imposing undue burdens on the courts or causing positive harm to the discovery process.

The proposal published in 1993 dealt with modification or dissolution of protective orders, not with the standards for

initial consideration of protective orders. A deliberate decision was made not to address the questions whether modification or dissolution can be sought by nonparties, or whether action is proper after judgment as well as before judgment. In his Senate committee testimony, however, Judge Higginbotham noted that courts frequently have permitted nonparties to seek modification or dissolution and that the 1993 proposal would permit continuation of this practice.

Preliminary results of the Federal Judicial Center study of protective orders were presented in a paper by Elizabeth C. Wiggins and Melissa J. Pecherski. Several aspects of the study were noted during the discussion. Studying three different districts for three years each, there was protective order activity in a range of 4.7% to 10.0% of all cases. Of course the figure would be higher as a percentage only of cases in which there was some discovery. It seems likely that the figure would be higher still as a percentage of cases in which there was a substantial amount of discovery activity, but the preliminary data do not provide this information. Most protective order activity is initiated by motion, not by stipulation of the parties; the highest figure for initiation by party stipulation was 26%. It was noted, however, that the data do not permit differentiation between types of cases; it would be consistent with these data to find that stipulated protective orders are commonplace in "complex" litigation. Approximately half the motions are met by a response in opposition; almost none were met by a "response in concurrence." The rate of hearings on motions was highly variable: in the District of Columbia, it was 12%, in Eastern Michigan 59%, and in Eastern Pennsylvania, 2%. Of the motions that were ruled upon by a judge, approximately equal numbers were denied, or granted in whole or in part. (By some chance, in all three districts 41% of the motions were granted in whole or in part.) Protective orders included a wide variety of provisions, but many included restrictions on disclosure or established procedures for handling confidential material. Of the suits in which an order was entered to restrict access to discovery materials, contract, civil rights, and "other statutes" actions accounted for large portions of the total. Personal injuries accounted for 8% or 9% of the total, depending on the district. Protective orders were modified or dissolved, whether by court order or agreement, in very few of the cases; there is no indication yet as to the types of cases involved or the reasons for modification or dissolution.

The first change in the 1993 draft would incorporate in (c)(1) an express provision recognizing and confirming the common practice of entering protective orders on stipulation by the parties. This change was accepted, on the express understanding that the court may refuse to enter an order notwithstanding stipulation of all parties. Rule 26(c)(1), as redrafted, simply provides that the

court "may" enter the order; in keeping with the Committee's style conventions, "may" is a word of permission, not mandate.

Throughout the discussion of other proposed changes, several members voiced concern with the substantive effects of protective orders. Information produced in discovery often is not public information. It can be reached, if at all, only by specified procedures limited to specified purposes. There is a substantive right of privacy that should not be violated by rules of procedure. The determination that privacy can be compromised by discovery appropriate to the needs of particular litigation does not justify allowing access to private information for other purposes. Public access to personnel files produced for employment discrimination litigation, for example, cannot be justified by vague invocations of the "public interest." Private information may be property protected against taking by the Fifth Amendment.

The distinction between limiting the scope of protective orders and establishing a positive right of access also ran throughout the discussion. The mere absence of a protective order does not establish a right of public access to discovery information that has not been filed with the court, nor to discovery proceedings. Care must be taken in drafting lest inadvertent references to "access" create a freedom-of-information act in the guise of protective order limits.

Discussion of the alternative draft began with paragraph (2). The draft provided that the court might protect materials only to the extent that the interest in confidentiality substantially outweighs the interest in access to the materials. It was suggested that the burden should lie in the opposite direction -- that the rule should provide that discovery material should be protected unless the public interest substantially outweighs the interest in privacy. It also was suggested that the unrestricted reference to denying protection "when a nonparty has an interest in access" was too broad. Concern was expressed that as with other proposals, this approach might require extensive satellite litigation of the questions of public interest and the balance between the interests in access and in privacy. Such attempts to add to the open-ended "good cause" approach of paragraph (1) were feared as adding another layer of litigation. Concern also was expressed that there is a tension with the provision that expressly permits entry of a protective order on stipulation of the parties: that the draft might be read to limit the court's power to enter a stipulated protective order by requiring that it independently determine the balance between the interests in confidentiality and openness. It was suggested that in most litigation there is no public interest, but the draft might require explicit consideration and rejection of this possibility in all cases. Even imposing the burden on the person asserting that the public interest overcomes

the interest in confidentiality does not clearly avoid this problem. All of these shortcomings could be addressed by limiting these issues to consideration on a motion to modify or dissolve. Present practice could continue. There has been no showing that protective orders are entered improvidently, or that they conceal the very nature or existence of the litigation. Allowing unimpeded entry of protective orders, perhaps with greater guidance as to the circumstances that justify modification or dissolution, would be better.

A motion to delete paragraph (2) of the alternative draft, leaving its provisions for incorporation in the provision on modification or dissolution, carried by vote of 9 to 3.

Paragraph (5) of the alternative draft provided that the court must allow a nonparty access to protected materials if the nonparty agreed to submit to the terms of the protective order and either had a claim or defense factually related to the protected materials or was a state or federal agency with jurisdiction over matters related to the protected materials. Discussion of this paragraph included reference again to the concern that there is a difference between denying protection and ordering access. It also was asked why this provision should be separate from the more general modification or dissolution provisions of the following paragraph (6). As with paragraph (2), it was suggested that this provision should be combined with the more general provisions on modification or dissolution. As a more specific matter, it was urged that a public agency should not be allowed access to materials without regard to whether it would have authority to compel production by its own independent proceedings. In the same vein, it was suggested that submission to the protective order might not be enough to protect against forced disclosure under a freedom-of-information act, not only with respect to federal agencies but also with respect to state agencies governed by a wide variety of state acts. Discussion of the aspect of the draft that would require the court to defeat protection produced general agreement that the verb should be changed to provide that the court "may," not must, defeat protection. No formal action was taken on paragraph (5).

Subparagraph (6) of the alternate draft provided detailed guidance for modification or dissolution of a protective order. One feature was discarded by consensus. The draft would have allocated the burden of justification according to the nature of the protective order. If the order had been entered on stipulation of the parties, the burden of establishing the need for continued protection would be on the party asserting the need. If the order was contested, the burden of establishing the need for modification or dissolution would be on the person seeking access to protected material. This distinction had been vigorously urged by a committee of the Association of the Bar of the City of New York in

commenting on the October, 1993 published draft. Concern was expressed that it might be difficult to determine whether an order had been contested, and that the distinction almost certainly would discourage stipulated orders because of the desire to secure the greater protection of a contested order. Half-hearted contests could lead to further confusion through arguments that an order was not genuinely contested. The values of stipulated protective orders should not be defeated by this provision.

The procedures for nonparty motions to modify or dissolve were discussed at length. It was recognized from the outset that the question of procedures is bound up with the importance of permitting extensive nonparty applications. Although it was noted that one possible means of raising the issue would be a subpoena issued in separate proceedings, commanding production of material subject to a protective order, there was no suggestion that such procedures should be encouraged. A protective order in one action ordinarily does not protect against production in independent proceedings by the party who initially controlled information that has been produced under a protective order. An effort to get the material from a party who received the information subject to a protective order, however, is better made by application to the court that entered the protective order. The alternative draft provided for motions in the court that entered the order by nonparties as well as parties. The motive for this approach was the belief that it should be as easy to deny an ill-founded motion directly as to deny intervention. Intervention, on the other hand, avoids the awkwardness of recognizing a nonparty's standing to make a motion.

Discussion of intervention by nonparty applicants began with recognition that intervention has been the procedure regularly used as the foundation for a motion to modify or dissolve. The rule could provide for use of an intervention procedure without invoking the intervention standards of Rule 24, and without directly addressing the question of "standing" to seek intervention. Intervention, moreover, makes it clear that the nonparty has submitted to the jurisdiction of the court to make binding orders that limit the use of any information released from the full reach of the original protective order.

Robert Campbell observed that the Federal Rules Committee of the American College of Trial Lawyers had spent several hours discussing the Rule 26(c) proposal, but had not anticipated this particular turn of the discussion to intervention. He asked, however, how Rule 24 intervention tests would apply to an applicant urging a public interest, particularly a generalized public interest in health or safety. It was responded that Rule 24 intervention tests are elastic, as shown by regular invocation of Rule 24 in present practice dealing with motions to modify or

dissolve. It was further suggested that an open invitation for nonparty motions might lead to unnecessary work for everyone involved – that an intervention procedure would permit an initial narrow focus on the question whether a plausible claim for modification or dissolution had been stated, sorting out claims that do not justify the burdens of full-scale argument and consideration.

A motion was made to adopt the first sentence of the alternative draft paragraph (6) as modified to refer to intervention. As a working model, it might begin: "A party – or a nonparty who has been granted intervention for this purpose – may move at any time before or after judgment to dissolve or modify * * *." This motion was not acted on. Discussion of the motion, however, further explored the usefulness of intervention along lines similar to the earlier discussion. Although Rule 24 intervention standards may seem to fit poorly the situation of a person who is not interested in the merits of an action, the intervention device allows a court to focus on the nature of the interest asserted as a matter separate from actual application of the standards for modifying or dissolving a protective order. If an applicant obviously cannot justify full-scale consideration of the issue, intervention can be denied. One approach would be to refer to intervention in the text of Rule 26(c) and to explain in the Note that Rule 24 does not identify the standards for intervention.

Another motion was made to strike paragraphs (2), (5), and (6) of the alternative draft. In their place, paragraph (3) of the October 1993 draft would be restored with additional discussion of public interest factors. The problems of nonparty motions, motions after judgment, and other matters would be left to continuing decisional development. This motion rested on doubts about the capacity of the Committee to discharge well the responsibility of drafting in greater detail. It was suggested that this motion was premature because the Committee had not yet finished discussion of all possibilities. The motion was not brought to a vote.

Further discussion noted that relief from a protective order might be sought by a nonparty bound by the order, as well as by a nonparty who simply wished to free someone else from the order.

Discussion of these issues led the Committee to conclude by consent that it would be better to avoid immediate decisions. One or two revised drafts will be prepared, reflecting the discussion, and circulated to the Committee. One draft might hew rather close to the 1993 proposal, while the other might venture into greater detail. If agreement can be reached, either to adhere to the proposal published in October, 1993, or to adopt a revised draft, the topic will be reported to the Standing Committee in time for

its January, 1995 meeting. It was agreed that if the recommendation should be adoption of a draft with significant additions to the published draft, the recommendation would include publication for comment before reaching a final recommendation to the Standing Committee.

Rule 43(a)

A revision of Rule 43(a) was published for comment in October, 1993. The revision was considered in light of the comments at the April, 1994 meeting of the Committee. No difficulty was caused by the first revision, which strikes the requirement that testimony be taken "orally." This revision makes it clear that testimony can be taken in open court from a witness who is unable to communicate orally but is able to communicate by other means.

The other revision added a new provision that the court may, for good cause, permit testimony "by contemporaneous transmission from a different location." This provision provoked substantial discussion and uncertainty. Doubts were expressed about moving toward "the courtroom of the future" in which everyone participates by remote electronic means from many scattered locations. A motion to send the revised rule forward to the Standing Committee for recommendation to the Judicial Conference failed by even division of the Committee.

Reconsideration of the Rule 43(a) proposals again produced no disagreement as to deletion of the requirement that testimony be given orally.

Discussion of the provision for transmitting testimony from a different location began with a protest that this device can appeal only to those anxious to be "trendy," "with it," and adept with "all the new toys." A lawyer confronted with a proposal to transmit testimony must face the choice of trusting to unseen arrangements made by others or of arranging to be present with the witness in person or by representative. Only physical presence with the witness can ensure that there is no improper coaching. If testimony is needed from a witness who cannot be present, the party desiring the testimony should arrange a video deposition after notice that ensures the opportunity to be present.

These concerns were met with various reassurances. Transmission of testimony could be useful in prisoner cases. State courts have substantial experience with conducting arraignments in this way. Transmission of testimony works well in admiralty proceedings. The lawyers for other parties can choose between participating through the system used to transmit the tesimony or participating by arranging for someone to be present with the witness.

Facing these concerns, it was moved that the draft be amended for purposes of further discussion by retaining the requirement of good cause and adding a requirement that compelling circumstances justify transmission of testimony. This amendment was adopted without dissent.

Further discussion of the amended proposal provoked new expressions of doubt whether available technology is yet sufficiently reliable to support transmission of testimony. It was observed again that it works in admiralty. Another illustration offered was the need to take formal authenticating testimony from the custodian of records in a remote location; this illustration was met by the response that ready resort to deposition or other means should show that there is no compelling need in such circumstances.

The next illustration was the witness who has an accident, a death in the family, or like calamity. Transmission is better than a "deposition" during trial. It is not a response that an earlier deposition should have been taken – the party calling a witness often will not seek to frame a deposition, no matter by whom taken, in the shape of expected trial testimony.

It was moved to delete the entire sentence providing for contemporaneous transmission of testimony from a remote location. The motion failed by vote of 5 in favor, 7 against.

The proposal, as amended to require "good cause shown in compelling circumstances," was then adopted with a recommendation that the Standing Committee recommend its adoption to the Judicial Conference. It was concluded that since the only change from the published version is to narrow the availability of transmission, there is no need to republish the proposal for an additional period of comment. It also was concluded that the Committee Note should be revised to make clear that remote transmission should be permitted only for truly compelling reasons.

Rule 47(a)

Several draft variations of Rule 47(a) were considered. Each variation would establish a right of party participation in the examination of prospective jurors. The variation most extensively discussed framed the right as one to supplement examination by the court, subject to reasonable limits set by the court.

Discussion was introduced with the observation that for many years, the Judicial Conference has opposed legislation that would establish a right for attorneys to participate in voir dire examination. Bills continue to be introduced. The most recent form of proposed legislation would set a minimum period that must

be allowed for party participation, expanded according to the number of parties but subject to a ceiling beyond which the number of parties makes no difference.

A major reason for examining the question again arises from the limits that have been placed on peremptory challenges. It has become increasingly important to establish information that supports a peremptory challenge that might be attacked on the ground that it seems based on stereotyped views of race, ethnicity, gender, or perhaps some other protected characteristic. If lawyers must explain peremptory challenges, the voir dire process must be sufficient to support them. The Supreme Court, moreover, has recognized that adequate voir dire is essential to get a fair jury. It is particularly important to have lawyer participation in capital punishment cases. The Criminal Rules Committee has decided to go forward with a proposal to establish a right of party participation, but has not worked out precise language. An effort should be made to draft common language for both the Civil and Criminal Rules.

It also was observed that federal judges fear lawyer participation because of the results that have occurred in some state courts, where lawyers drag voir dire out to undue length. Lawyers sometimes manage to make long argumentative statements about the case, concluding with a question mark. Attempts may be made to ingratiate the lawyer with the jury, to secure commitments to hypothetical positions, or worse. Any right of lawyer participation must be subject to judicial control that eliminates these dangers. A specific time limit, however, probably does not make sense.

Additional information was provided by a survey of current federal practice conducted by John Shapard and Molly Johnson of the Federal Judicial Center at the request of the Committee. The survey was mailed to 150 active district judges; 124 responded. The responses showed that 59% of the responding judges allow some form of attorney participation in voir dire. The average time spent in voir dire was essentially the same across all forms of lawyer participation, ranging from allowing counsel to conduct most or all of the voir dire to limiting counsel to suggesting additional questions to be asked by the court. Judges who allow questioning by counsel listed a number of means used to prevent improper or unduly extended use of voir dire. Forty-four percent responded that it was rarely necessary to do anything, perhaps in part because 79% responded that they make it clear at the outset that inappropriate behavior is not permitted. Fifty percent generally limit the time for voir dire. Among specific limits listed were rules that prohibit addressing a question to an individual juror if it can be addressed to the panel as a whole, prohibit attempts to "instruct" jurors, and prohibit any effort to

seek a juror's commitment to support a position based on a hypothetical fact statement.

Turning to the question of drafting, it was urged that it is important to define the right as one to supplement the court's voir dire. This perspective makes it clear that the court is in control, and establishes the foundation for the court's power to establish reasonable limits that respond to many case-specific factors, including the extent of examination by the court. The Committee was informed that the Criminal Rules Advisory Committee concluded that there must be an "escape clause" to ensure authority to control abuse by pro se defendants. It was agreed that this power of control must be included in the power of the court to limit the time, manner, and subject matter of the examination.

District judge members noted that each of them now allows attorney participation in voir dire. But caution was expressed about incorporating this practice in the rule as a "right." Although the rule would establish the authority to limit lawyer participation, creation of even a limited right expands the possibility of appellate reversal on finding one limit or another unreasonable. One judge, for example, is "very tough" on argumentative questions. A rule requiring that limits be reasonable would exert some pressure to lighten up on this stance. It would not be enough simply to allow exceptions "in the interest of justice." Another judge noted that he had seated perhaps 1,000 juries. Lawyers, when given the chance to participate in voir dire, have done it properly. In addition, he and many others have found that it is helpful to use questionnaires to get information that is difficult to elicit in open court. Many judges conduct the first stage of juror examination, and then allow lawyers to participate.

Lawyer members of the Committee stated that often they do not get enough information to make intelligent challenges. This problem is particularly acute with judges that do not use questionnaires and who conduct ineffective voir dire examinations. Judges who do not allow lawyers to participate often do a poor job. State courts in such states as Louisiana and California do a good job of controlling lawyer participation.

Robert Campbell noted that the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers generally supports the proposal to establish a right of lawyer participation, but recognizes that this is a tricky question. Lawyers are concerned about judges who believe that expedition is the key to justice, racing through a meaningless voir dire — perhaps in the belief that it makes no difference — to select a jury quickly. But there also is a risk created by lawyers who continually push as close as possible to the mistrial line in

seeking to misuse voir dire to persuade or intimidate jurors.

Barry McNeil urged that there is no issue more important to trial lawyers than participation in voir dire. Often it does not take long. Often the questions go to knowledge, not to bias. Mandatory language is highly desirable.

These concerns were translated into a motion to revise the final draft variation to read as follows: "The court must conduct the examination of prospective jurors. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion." The motion passed by vote of 12 to 0.

Two suggestions were made for additions to the draft Committee Note to reflect the changes in the text of the rule and the discussion. The Note should describe the virtues of juror questionnaires as a means of eliciting useful information and providing the foundation for effective but efficient voir dire examination. And it should stress the importance of appellate deference to trial court discretion in setting limits on the time, manner, and subject matter of attorney questions.

Rule 48

The proposal to amend Rule 48 to require 12-member juries was supported by a separate volume of readings on jury size. These readings underscore many of the issues discussed in brief compass, or simply assumed, in the Committee discussion.

The introductory comments began by observing that the path by which 6-person juries became the norm, replacing 12-person juries, has been a source of uneasiness from the beginning. Reduction of jury size by local court rules was urged in the interests of efficiency and cost. The decisions that due process allows state courts to try criminal cases to juries with as few as 6 members paved the way for the decision that the Seventh Amendment also permits 6-person juries. The rulemaking process of course does not provide the occasion for reconsidering Supreme Court interpretations of the Seventh Amendment. Sound procedure, however, may justify means that are not constitutionally required.

The recent elimination of alternate jurors has been welcomed, because it avoids the need to excuse alternates at the end of trial without an opportunity to participate in the process of deliberation and decision. The Committee Note to the 1991 Rule 48 amendments observed that ordinarily it is "prudent and necessary" to seat more than 6 jurors in order to guard against sickness or disability. It further observed that use of more than 6 jurors is

desirable because it increases the representativeness of the jury, and that smaller juries "are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power." These concerns underlie the common practice of seating 8 or even 10 jurors in trials that seem likely to go more than 3 days. The more apt comparison is between 8- and 12-person juries, not 6- and 12-person juries.

Many scholars agree that 12-member juries are better. The vast weight of history and tradition creates a strong presumption in favor of 12. A 12-person jury, moreover, makes it much more probable that any single jury will include representatives of significant minority groups. The importance of representativeness has been underscored by recent decisions that limit the use of peremptory challenges for the purpose of striking minority members from a jury; it is ironic that one of the surest safeguards of representativeness should be sacrificed in the name of expediency. Smaller jury verdicts, moreover, are more erratic, less stable, for a variety of reasons. In many ways, the capacities and behavior of a group of 6 are different from those of a group of 12. It is more difficult for a single aggressive juror to dominate a larger group. Larger juries bring broader ranges of experience and values to the deliberation, and are better able to recall trial evidence.

The argument for smaller juries is that they perform as well and cost less. It is difficult to generate useful estimates of the added costs. Much depends on efficient management of the jury pool. Use of "staggered starts," for example, with different judges of the same court setting different times for beginning the jury selection process, can achieve significant efficiencies. Without attempting to assume any new efficiencies on this score, however, initial rough estimates suggest that the additional annual cost of returning to 12-person juries would range from a low estimate of about $4,000,000 to higher estimates of three or four times that much. These sums are not insignificant. All estimates, however, are a fraction of one percent of the judiciary budget, an infinitesimal fraction of one percent of the national budget, and only a few cents per person each year.

Turning to detailed drafting issues, it was agreed that the present rule means that the parties can stipulate to a nonunanimous verdict, or to a jury of fewer than 6 members, at any time through verdict.

Robert Campbell told the Committee that the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers feels strongly about returning to 12-person juries. They also believe that there should be alternates. The 12-person jury has been used for a long time. It is much easier for one juror to manipulate a 6-person jury than a 12-person jury.

A motion was made to adopt "Variation 1" of the alternative drafts submitted for consideration. This version requires that the court seat a jury of 12 members. The balance of Rule 48 is retained with only stylistic changes. The motion was adopted by a vote of 12 to 0.

It was moved that the rule be amended to require a jury of "no fewer than" 12 members, so that a larger number could be seated for a long trial. A parallel suggestion was that the use of alternates should be restored. If more than 12 are seated, either some must be treated as alternates or all must be allowed to deliberate. It was suggested that it would be unwise to have more than 12 deliberate. Designation as alternates could be left to the end of trial, however, even by some device such as drawing lots. If the parties were concerned about a larger jury, they could stipulate to a smaller one. This approach, however, would leave the parties subject to persuasion by the trial judge. Another problem seen with a jury of more than 12 members was that the number of peremptory challenges is set by statute. It would be necessary to determine whether an increase beyond 12 jurors would warrant an increase in the number of peremptory challenges, and if so how to accomplish the change. The motion to amend failed by vote of 0 to 12.

A motion was then made to begin the rule with a power to stipulate to a jury of fewer than 12 members: "Unless the parties stipulate to a smaller jury, the court must seat a jury of twelve members." This motion failed by vote of 2 to 11.

The draft variations that tied jury size to various nonunanimous verdict formulas were discussed briefly. It was agreed that the unanimity requirement has profound effects on the dynamics of deliberation. These variations were dismissed without further discussion.

Rule 53

Discussion of the Rule 53 draft began with the statement of the chair that Judge Wayne Brazil had been deeply involved in the back-and-forth process of generating the draft. Great appreciation was expressed by the Committee both for this assistance and for Judge Brazil' s great services to the Committee during his period as a member.

The Rule 53 draft was submitted in two forms. The earlier form set out three related rules. Draft Rule 53 rewrote present Rule 53. Draft Rule 53.1 invoked Rule 53 but added separate provisions for pretrial masters. Draft Rule 53.2 likewise invoked Rule 53 but added separate provisions for post-trial masters. This form reflected the history of the project. An initial suggestion

for a modest amendment to reflect the growing role of pretrial masters led to a Committee recommendation that a rule be prepared governing pretrial masters in some detail. Consideration of that draft persuaded the Committee that if the subject were to be approached, it might be better to undertake a more thorough revision of Rule 53. One of the major reasons for this conclusion was the level of detail with which the pretrial master draft regulated topics also involved with trial or post-trial masters. The first response to this conclusion was the set of three related rules. A later response was to fold all three into a single revised Rule 53.

Several distinguished academics had provided reactions to these drafts. One of the common reactions was surprise that masters are used for trial purposes — these observers have become so accustomed to the pretrial and post-trial functions of masters that they were uncomfortable with the traditional trial role of masters. These reactions were supplemented with the observation that there has been concern about the dissonance between Rule 53 as a trial master rule and the flourishing use of pretrial masters. One question is whether Rule 53 should continue to provide for trial masters at all. The role of the trial master's report is uncertain, particularly in a jury trial. The tracks for presenting pretrial-gathered evidence now include the 700 series Evidence Rules, and Evidence Rule 1006. These did not exist as such when special masters were taking root. If a master is to be a witness at trial, should it be by other means? And if the traditional trial function of masters were to be abolished, should the remaining roles be covered by a rule outside the Rule 53 framework?

John Frank observed that with masters, we are dealing with the "fourth tier" in relation to Article III. This issue was faced in the 1980s with the question whether a new court should be created as an intermediary between the circuit courts of appeals and the Supreme Court. Bankruptcy courts and magistrate judges both function as fourth tiers. Masters are another fourth tier. We should not "create" this practice. To the extent that trial master practice is dwindling, it is a good process. We should not encourage a separate fourth-tier process that competes with magistrate judges.

It was asked whether there are any abuses that might demonstrate the need for a rule amendment. The response was that the question is not so much one of abuses as one of a large practice that does not appear to be supported by present Rule 53. A revised rule could validate this practice and regulate it. There are, however, no rigorous data detailing the developing use of pretrial or post-trial masters. Professor Margaret Farrell has done a recent study for the Federal Judicial Center, but it proceeds by systematic review of specific experiences rather than

a generalized survey.

Experience with trial masters was described from a practitioner's perspective. The device can be useful as a means of addressing part of a complicated case that requires detailed evidence, leaving the rest of the trial for the court. Usefulnes, however, depends on the agreement of the parties to accept the master's report as final. Trial masters should be used only if the parties agree to treat the report as final. In one jury trial, with the consent of the parties, the master's report was submitted to the judge, objections were made to the judge, and the report as thus finalized was read to the jury as dispositive on the issues involved. In another case, the report was offered as a piece of evidence, to be supported or rebutted by other evidence. That experience was "a zoo."

It was noted that maritime damages cases often are tried to a master. Another experience involved use of a master in a massive foreclosure to rule on the priority of liens and to distribute a $25,000,000 fund among 260 applicants. Superfund and like litigation frequently involves resort to masters. In California, experts often are used as masters in leaking underground storage tank litigation. Other experiences involved use of a master in a three-judge court redistricting case, in a class action with 20,000 claims; in an action parcelling out a complex real estate division; and in attorney fee disputes.

A master also may have the advantage of expert experience. John Frank noted a case in which this advantage was in fact realized.

Returning to pretrial masters, it was asked whether Rule 53 authorizes developing practices. Inherent power was noted as an alternative source of authority. A rule that — as Rule 53 — approaches a procedure without authorizing it does not always, by negative implication, preempt the field and oust reliance on inherent power. Consensual use should not be troubling. The structural components of Article III and the Seventh Amendment are satisfied by consent of the parties; the master becomes essentially an arbitrator operating within the framework of an Article III tribunal.

Greater difficulties are presented by nonconsensual use. Unique and complicated subject matters often present courts with a need for assistance. Reliance on private individuals who serve as masters can, however, present problems of competence. Lawyer-masters, moreover, also present problems of conflicting interests.

Thomas Willging noted that when he and Joe Cecil studied court-appointed expert witnesses, they found judges using the

witnesses as expert advisers. Evidence Rule 706 experts are used not just as witnesses. Their sense was that there is little authority, apart from inherent power.

It was suggested that discussion should focus on the contested use of a master. Parties may agree even on the use of an expert as adviser to the court; agreement means there is little problem. If there is a large not-consented use of masters, there are serious questions of authority, proper practice, and the like.

At the end, it was concluded that there is no apparent need for imminent action. The Rule 53 drafts will be treated as an information-study item for the time being. Should reason appear for further work, they may provide a useful starting point.

Rule 68

Rule 68 has been before the Committee for some time. At the April, 1994 meeting, it was concluded that further action should await completion of the Federal Judicial Center study of Rule 68. John Shapard, who is in charge of the study, put it aside over the summer for the purpose of completing the survey of practices surrounding attorney participation in voir dire examination of prospective jurors. See the discussion of Rule 47(a) above.

An informal survey of California practice was described. California "section 998" uses costs as an offer-of-judgment sanction, but costs commonly include expert witness fees in addition to the more routine items of costs taxed in federal courts. Generally this sanction is seen as desirable, although respondents generally would like more significant sanctions. Most thought the state practice was more satisfactory than Rule 68. There was no strong feeling against the state practice. One lawyer thought the state practice restricts his freedom in negotiating for plaintiffs. This state practice seems preferable to the complicated "capped benefit-of-the-judgment" approach embodied in the current Rule 68 draft.

Another comment was that Rule 68 becomes an element of gamesmanship in fee-shifting cases. It is like a chess game – an extra shield and tool in civil-rights litigation. It is working close to a casino mentality. But Rule 68 has meaning only in cases where attorney fees are thus at stake. It would be better to abandon it.

Professor Rowe described his ongoing empirical work with Rule 68, investigating the consequences of adding attorney-fee sanctions. The work does not answer all possible questions. An offer-of-judgment rule may have the effect of encouraging strong small claims that otherwise would not support the costs of suit;

this hypothesis has not yet been subjected to effective testing. There does seem to be an effect on willingness to recommend acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

Evidence Rules 413 - 415

New Evidence Rules 413 to 415 were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. These Rules take effect 180 days after the bill was signed unless the Judicial Conference recommends alternative provisions to Congress within 150 days after signing. The deadline is February 10, 1995. The Evidence Rules Committee has recommended alternative provisions; its deliberations were summarized. The Criminal Rules Committee has reviewed the Evidence Rules Committee recommendations and has voted to support them.

It was further noted that the author of the provisions enacted by Congress apparently thought that a Rule 403 balancing test applies to the decision whether to admit evidence apparently admissible under the new rules. There is history to support this view. But the plain language of the Rules shows that they were not drafted to say what they intended to say. The Evidence Rules Committee responded to this information by drafting its alternative recommendations as Evidence Rule 404(a)(4). The approach taken was only to improve the drafting to reflect Congressional intent, not to change the substance of what Congress intended. This approach may be bolstered by the view that the purpose of providing 150 days for alternative Judicial Conference recommendations was to seek drafting suggestions, not comment on the wisdom of the choices made by Congress.

Substantial discomfort was expressed with the substance of the Congressional provisions. It was urged that this Committee should draft an alternative provision that would hew as close as possible to the views that have been expressed repeatedly in recent years by Judicial Conference committees, substantially different from the provisions adopted by Congress. A "mere hortatory response" would be lost without a trace in the echoes of history. An alternative draft would at least give the Standing Committee an alternative to consider if it should decide to take a more aggressive stance than that adopted by the Evidence Rules Committee.

These sentiments were met by concerns that although the substance of the Congressional approach leaves much to be desired, the views of Judicial Conference committees have been made clear to Congress. Vigorous efforts were made to advance these views during the legislative process, without significant success. Rejection of these views was particularly clear with respect to the argument that "other crimes" evidence should be limited to cases of actual convictions. To engage in a process of competing with the Evidence Rules Committee draft might simply vitiate the effectiveness of any response by the Standing Committee.

At the conclusion of this discussion, the sense of the Committee was that the Committee should support the conclusions of the Evidence and Criminal Rules Committees that as narrow an

approach as possible should be taken in attempting to improve the drafting of the Rules adopted by Congress. This support should be conveyed to the Standing Committee.

Next Meetings

The next two meetings of the Committee were set. One will be in Philadelphia on Thursday and Friday, February 16 and 17, 1995. The agenda for this meeting will focus solely on Rule 23. Several experienced class-action litigators and a few scholars will be invited to describe their experiences and thoughts for the Committee. The following meeting will be in New York on April 20 to 22, 1995. This meeting will be held in sequence with the mass tort symposium of the Institute for Judicial Administration at New York University. It is hoped that members of the Committee will be able to attend the symposium as another element in the continuing study of Rule 23.

Respectfully submitted,

Edward H. Cooper, Reporter